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IN THE
COURT OF APPEALS OF INDIANA

JULIE A. (BEACH) ESTELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 54A01-0506-CV-287
	)	
WERNLE RISTINE & AYERS, L.P.C.,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas K. Milligan, Judge
Cause No. 54C01-0309-PL-382

August 22, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Wernle, Ristine & Ayers, L.P.C. (WRA) sued Julie A. Estell[1] for breach of contract. Following a bench trial, WRA prevailed in its lawsuit. Estell appeals, presenting the following restated issues for review:

1. Did the trial court misinterpret the circumstances under which Estell was obligated to repay her base compensation, and also misinterpret the formula for calculating that obligation?

2. Did the contract limit repayment of Estell's overpaid base compensation to a specified source?

3. Was WRA's collection of outstanding client accounts a condition precedent to Estell's obligation to repay her base compensation?

4. Did the trial court fail to credit Estell for post-termination collections?

In its cross-appeal, WRA presents the following restated issue:

5. Is WRA entitled to interest on the amount of base compensation not yet repaid by Estell?

We affirm.

The facts favorable to the judgment are that on April 1, 1998, Estell began working as an associate attorney for WRA. The employment agreement (the Agreement) stated, in relevant part:

> 4. **ACCOUNTING FOR SERVICES.** Employer shall collect all fees, compensation, money, and any other things received or realized as a result of employee's efforts on behalf of Employer's clients . . . .
>
> 5. **COMPENSATION.** The amount of Employee's compensation shall be determined by a formula based upon the amount of money actually collected during the calendar year by Employer as a result of services performed by Employee.

[1] At the beginning of litigation, Estell's surname was Beach. Estell, however, assumed her previous name during the course of litigation. Although the trial court referred to her as "Beach," we refer to her herein as Estell.

a. **Base Compensation.** Employee shall receive the sum of Twenty Thousand Eight Hundred Dollars ($20,800.00) per annum as Base Compensation, which Base Compensation is as a result of Employee's services rendered to Employer's clients. Said Base Compensation shall be paid to Employee in equal weekly installments of Four Hundred Dollars ($400.00), less all amounts required to be withheld by law or agreed to be withheld or deducted. Said Base Compensation shall be adjusted on a pro-rata basis for the remaining portion of the 1998 calendar year (from April 1, 1998 through December 31, 1998), for a total of Fifteen Thousand Six Hundred Dollars ($15,600.00) in Base Compensation to be paid by Employer to Employee from April 1, 1998 through December 31, 1999, in thirty-nine (39) equal weekly installments of Four Hundred Dollars ($400.00), less all amounts required to be withheld by law or agreed to be withheld or deducted.

b. **Additional Compensation.** Employee shall receive, as Additional Compensation, one-third (1/3) of every dollar over and above the sum of Sixty-Two Thousand Four Hundred Dollars ($62,400.00) actually collected by Employer as a result of Employee's services rendered to Employer's clients per calendar year (hereinafter "Year of Accounting"). Said Additional Compensation shall be pro-rated during the remaining portion of the 1998 calendar year such that, during the remaining portion of the 1998 calendar year, Employee shall receive, as Additional Compensation, one-third (1/3) of every dollar over and above the product of three (3) times the amount of Employee's Base Compensation paid in 1998. Said Additional Compensation shall be paid to Employee in a single lump sum on or before April 1st following the Year of Accounting, less all amounts required by law or agreed to be withheld or deducted.

If, in the Year of Accounting, Employer actually collected at least the sum of Sixty-Two Thousand Four Hundred Dollars ($62,400.00) ($46,800.00 in 1998) as a result of Employee's services rendered to Employer's clients, Employer's advance to Employee of said Base Compensation shall be considered to be repaid and satisfied in full.

If, however, in the Year of Accounting, Employer collected less than the sum of Sixty-Two Thousand Four Hundred Dollars ($62,400.00) ($46,800.00 in 1998) as a result of Employee's services rendered to Employer's clients, thereby resulting in a shortfall in Employee's collections and, therefore, an overpayment of Base Compensation to Employee, any such overpayment of Base Compensation to Employee

> shall carry forward as a debt owed by Employee to Employer into the next Year of Accounting. Any such overpayment of Base Compensation shall be repaid by Employee to Employer from Employee's Additional Compensation, if any, by deducting the amount of two-thirds (2/3) of Employee's Additional Compensation in the next Year of Accounting. If, in the next Year of Accounting, there is another shortfall in Employee's Collections, any overpayment from that year and the preceding year shall carry forward as a debt owed to Employer by Employee into the next Year of Accounting, and so forth, until repaid in full in accordance with the foregoing repayment formula.
>
> c. **Termination of Employment.** In the event Employee's employment with Employer ceases for any reason, Employee shall account for and shall repay in full to Employer any overpayment of Base Compensation to date of cessation of employment, whether from the then current Year of Accounting or as carry-over from previous Years of Accounting. All such sums shall be repaid to Employer within ninety (90) days after cessation of employment.

Appellant's Appendix at 139-42. Effective September 1, 1999, paragraph 5(a) of the Agreement was amended to increase Estell's base compensation from "Twenty Thousand Dollars ($20,000.000) per annum . . . to . . . Forty Thousand Dollars ($40,000.00) per annum . . . ."[2] *Id.* at 143. The Agreement remained effective as originally written in all other respects.

In 1998, WRA paid Estell a base compensation of $15,600, and collected $16,722.51 in clients' fees generated by Estell's work. In 1999, WRA paid Estell a base compensation of $27,476.91, and collected $30,780 in clients' fees generated by Estell's work. In 2000, WRA paid Estell a base compensation of $5,384.61, and collected $4,488.70 in clients' fees generated by Estell's work. On approximately February 11,

[2] The Agreement as originally written recites a base compensation of $20,800.00. The amendment to that agreement, however, recites an original base compensation of $20,000.00. Neither party raises an issue regarding the patent discrepancy, nor is it critical to our review. We will not, therefore, address that issue.

2000, Estell received a memorandum from WRA terminating her employment under the Agreement and proposing employment under new terms. Estell declined, and vacated her office as of that date.

On September 10, 2003, WRA filed a complaint for damages against Estell alleging breach of contract. Estell counterclaimed, alleging WRA's complaint was frivolous and in bad faith. A bench trial was conducted on February 24, 2005, after which the trial court rendered the following judgment:

> 1. The Agreement [] is that [Estell] will work as an attorney for WRA and be paid one-third of the money billed and collected by WRA for the work she performed. She was to draw against the one-third at the rate of $400.00 per week, and later $800.00 per week. Any draw[] which exceeded her one-third[] would be carried forward and the repayment of the overpayment was to be made out of future collections in which her one-third exceeded her draw. Upon cessation of employment any overpayment, whether from the current or past years [of] accounting, were to be repaid within 90 days of termination of employment. There would be no future collections from which that payment could be made. Because it is upon termination there can be no provision that the payment be made out of future collections, and that was not provided for. The language simply [states] the obligation must be paid.
>
> . . .
>
> 3. WRA has failed to prove [that there was an account stated, and WRA's] claim based on the "account stated" theory must fail.
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> 4. [T]he contract language is unambiguous. It provides that WRA is owed a debt by [Estell] for overpayments of Base Compensation when the amount collected by WRA is less than three times [Estell's] Base Compensation. . . . [T]he plain meaning of the language of the Agreement [] is that [Estell] is to be paid one-third of the money collected by WRA as a result of her work and that she is entitled to draw against that one-third at a certain rate. If there is a greater draw than her one-third would entitle her to then she has overdrawn and owes the difference to WRA.
>
> . . .

> 6. Section 5(c) . . . states that if [Estell] ceases her employment with WRA . . ., she shall "account for and repay in full" to WRA the total of all overpayments of Base Compensation within ninety days of separation. . . .
>
> 7. WRA was under no contractual duty to collect fees. If there was such a duty, it was not a condition precedent to [Estell's] duty to repay any overpayment. . . . [W]hether or not WRA collected fees, there was a duty to repay any overpayments. That was the agreement.
>
> 8. [T]he contract provisions . . . do not establish liquidated damages or a penalty clause. They merely require the repayment of money advanced pursuant to the parties' agreement.
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> 9. [Estell] is liable for repayment of the excess received over her calculated proper compensation as stated in the accountings in the amount of $31,131 and for repayment of the erroneous payment of medical reimbursements, in the amount of $1,045.93.
>
> 10. [Estell] should be given credit against the overpayment she owes in the amount of $4,076, that being one-third of the $12,228 collected since May 31, 2000.

Appellant's Brief at 26-28. WRA and Estell now appeal.

Each issue requires us to interpret the terms of a written contract and therefore involves a pure question of law. *Whitaker v. Brunner*, 814 N.E.2d 288 (Ind. Ct. App. 2004), *trans. denied*. Our standard of review in such cases is *de novo*. *Id.* Our primary task when interpreting the meaning of a contract is to determine and effectuate the intent of the parties. *Id.* We must first determine whether the language of the contract is ambiguous. *Id.*

"The unambiguous language of a contract is conclusive upon the parties to the contract and upon the courts." *Id.* at 294. If the language of the contract is unambiguous, the parties' intent will be determined from the four corners of the contract.

Whitaker v. Brunner, 814 N.E.2d 288. Conversely, if a contract is ambiguous, its meaning must be determined by examining extrinsic evidence and its construction is a matter for the fact-finder. *Id.* When interpreting a written contract, we attempt to determine the intent of the parties at the time the contract was made by examining the language used in the instrument to express their rights and duties. *Id.* We read the contract as a whole and attempt to construe the contractual language so as not to render any words, phrases, or terms ineffective or meaningless. *Id.* We must accept an interpretation of the contract that harmonizes its provisions rather than one that places its provisions in conflict. *Id.*

1.

Estell contends the trial court misinterpreted the circumstances under which she was obligated to repay advanced funds. Specifically, she asserts the trial court erroneously concluded the Agreement required her to repay WRA the sum of any advanced funds from her base compensation that exceeded one-third of the amount actually collected from her clients.

According to Estell, "there is no overpayment [of base compensation] resulting in her obligation to repay WRA unless the amount collected by WRA is less than the actual Base Compensation paid to her." *Appellant's Brief* at 10. WRA contends, and the trial court agreed, the Agreement required Estell to repay WRA the sum of any advanced funds in the form of base compensation in excess of one-third of fees collected from

WRA's clients resulting from Estell's services. In order to resolve this dispute, we must first look to the language of the Agreement.[3]

Paragraph 5 of the Agreement states, "[t]he amount of [Estell]'s compensation shall be determined by a formula based upon the amount of money actually collected during the calendar year by [WRA] as a result of services performed by [Estell]." *Appellant's Appendix* at 140. Paragraphs 5(a) and (b) provide the "formula" for determining Estell's compensation, and state:

> [Estell] shall receive the sum of Twenty Thousand Eight Hundred Dollars ($20,800.00) per annum as Base Compensation . . . . Said Base Compensation shall be paid to [Estell] in equal weekly installments of Four Hundred Dollars ($400.00), less all amounts required to be withheld by law or agreed to be withheld or deducted. Said Base Compensation shall be adjusted on a pro-rata basis for the remaining portion of the 1998 calendar year (from April 1, 1998 through December 31, 1998) . . . .
>
> [Estell] shall receive, as Additional Compensation, one-third (1/3) of every dollar over and above the sum of Sixty-Two Thousand Four Hundred Dollars ($62,400.00) actually collected by [WRA] as a result of [Estell]'s services rendered to [WRA]'s clients per calendar year (hereinafter "Year of Accounting"). Said Additional Compensation shall be pro-rated during the remaining portion of the 1998 calendar year such that, during the remaining portion of the 1998 calendar year, [Estell] shall receive, as Additional Compensation, one-third (1/3) of every dollar over and above the product of three (3) times the amount of [Estell]'s Base Compensation paid in 1998.
>
> If, in the Year of Accounting, [WRA] actually collected at least the sum of Sixty-Two Thousand Four Hundred Dollars ($62,400.00) ($46,800.00 in 1998) as a result of [Estell]'s services rendered to [WRA]'s clients,

[3] An illustration of the effect of the parties' differing interpretations will help clarify the dispute. Assume Estell was given a base compensation of $10,000, and WRA collected $12,000 as a result of her services. According to Estell's interpretation, she would owe WRA no debt because the amount collected as a result of her services exceeded her base compensation. According to WRA's interpretation, however, Estell would owe $6,000 because her base compensation exceeded one-third of the amount collected as a result of her services by that amount (i.e., $10,000 – ($12,000/3)).

> [WRA]'s advance to [Estell] of said Base Compensation shall be considered to be repaid and satisfied in full.
>
> If, however, in the Year of Accounting, [WRA] collected less than the sum of Sixty-Two Thousand Four Hundred Dollars ($62,400.00) ($46,800.00 in 1998) as a result of [Estell]'s services rendered to [WRA]'s clients, thereby resulting in a shortfall in [Estell]'s collections and, therefore, an overpayment of Base Compensation to [Estell], any such overpayment of Base Compensation to [Estell] shall carry forward as a debt owed by [Estell] to [WRA] into the next Year of Accounting. . . . If, in the next Year of Accounting, there is another shortfall in [Estell]'s Collections, any overpayment from that year and the preceding year shall carry forward as a debt owed to [WRA] by [Estell] into the next Year of Accounting, and so forth, until repaid in full in accordance with the foregoing repayment formula.

Id.

The "base compensation" paid by WRA to Estell is referred to as an advance. *See id.* An "advance" is defined as "[m]oney . . . furnished on credit. A loan, . . . or money advanced to be repaid conditionally . . . ." *Black's Law Dictionary* 33 (Abridged 6th ed. 1991). The condition that triggered the obligation to repay forms the basis of Estell's contention. Estell asserts she was obligated to repay the advance only if her base compensation, i.e., her advance, exceeded the amount actually collected by WRA as a result of her services rendered to clients. Estell's interpretation, however, defies the plain meaning of the Agreement.

Paragraph 5(b) states, "[Estell] shall receive, as Additional Compensation, [i.e., monies beyond her Base Compensation,] one-third (1/3) of every dollar over and above the sum of Sixty-Two Thousand Four Hundred Dollars ($62,400.00) actually collected by [WRA] as a result of [Estell]'s services rendered . . . ." *Appellant's Appendix* at 140. The threshold for earning Additional Compensation was $62,400.00, or three-times the

amount of her base compensation, i.e., $20,800.00. Further, the Agreement states, "[i]f, in the Year of Accounting, [WRA] actually collected . . . Sixty-Two Thousand Four Hundred Dollars ($62,400.00) ($46,800.00 in 1998) as a result of [Estell]'s services rendered to [WRA]'s clients, [WRA]'s advance to [Estell] of said Base Compensation shall be considered to be repaid and satisfied in full." *Id.* The Agreement, therefore, states Estell's obligation to repay WRA's advance was satisfied if the amount actually collected as a result of her services was three-times greater than her base compensation.

Conversely, if WRA collected less than $62,400 (or $46,800 in 1998) for Estell's services, such would: (1) constitute a shortfall equal to the difference between the two amounts; (2) result in an overpayment of base compensation; and (3) result in a debt owed by Estell to WRA equal to one-third of the difference between the two amounts. The Agreement, therefore, unambiguously demonstrates the parties' intent that: (1) Estell's base compensation constituted a loan from WRA to Estell; (2) any dollar advanced to Estell in the form of base compensation constituted a debt that was discharged by WRA's collection of three dollars resulting from Estell's services; and (3) Estell remained liable for any unpaid advance on a year-to-year basis. Thus, the trial court did not misinterpret the circumstances under which Estell was obligated to repay advanced funds.

2.

Estell next contends the trial court erred in concluding the Agreement did not limit the source of repayment of advanced funds to "additional compensation," if any. Estell asserts the "[A]greement between the parties clearly and unambiguously provides that

any and all reimbursements of 'overpayments' will be made *solely and completely* from Estell's Additional Compensation . . . ." *Appellant's Brief* at 12 (emphasis in original).

Paragraph 5(b) states, in relevant part, "[a]ny [] overpayment of Base Compensation shall be repaid by [Estell] to [WRA] from [Estell]'s Additional Compensation . . . ." *Appellant's Appendix* at 140. Read in isolation, this provision supports Estell's interpretation. The Agreement, however, further provides, "[i]f, in the next Year of Accounting, there is another shortfall in [Estell]'s Collections, any overpayment from that year and the preceding year shall carry forward as a debt owed to [WRA] by [Estell] into the next Year of Accounting, and so forth, until repaid in full . . . ." *Id.* The Agreement, therefore, unambiguously provides that any overpayment of base compensation was not to be discharged if Estell's additional compensation, if any, did not exceed the amount of unreimbursed advances.

Further, Paragraph 5(c) states, "[i]n the event [Estell]'s employment with [WRA] ceases for any reason, [Estell] shall account for and shall repay in full . . . any overpayment of Base Compensation to date of cessation of employment. . . . All such sums shall be repaid to [WRA] within ninety (90) days after cessation of employment." *Id.* at 141. To the extent Estell's debt from overpayment of base compensation was exclusively repayable from additional compensation during her continuing employment with WRA, Paragraph 5(c) unambiguously states that, upon termination of the employment relationship, Estell remained liable to WRA for all previously unreimbursed overpayments without regard to additional compensation. The trial court, therefore, did

not err in concluding that, following termination of her employment, Estell was obligated to repay all overpayments of base compensation that occurred during her employment.

3.

Estell contends "WRA's collection of client bills [was] a condition precedent to [her] duty to repay Base Compensation overpayments." *Appellant's Brief* at 17. "Under contract law, a condition precedent is a condition that must be performed before the agreement of the parties becomes a binding contract or that must be fulfilled before the duty to perform a specific obligation arises." *AquaSource, Inc. v. Wind Dance Farm, Inc.*, 833 N.E.2d 535, 539 (Ind. Ct. App. 2005). The trial court concluded, however, that WRA's contractual duty to collect fees, if it existed at all, was not a condition precedent to Estell's duty to repay any overpayment.

Paragraphs 4 and 5(b) of the Agreement state:

> [WRA] shall cause its clients to be billed . . . . [WRA] shall collect all fees, compensation, money, and any other things received or realized as a result of [Estell]'s efforts . . ., except that [Estell] . . . shall keep as her sole and separate property any and all compensation received [from her pre-existing contract with the State of Indiana.]
>
> If . . . [WRA] collects less than . . . Sixty-Two Thousand Four Hundred Dollars . . . as a result of [Estell]'s services[,] . . . any such overpayment of Base Compensation to [Estell] shall carry forward as a debt owed . . . to [WRA] . . . .

Appellant's Appendix at 139-40. Estell asserts the foregoing provisions required WRA to collect all fees, and that her duty to repay could not be ascertained unless and until WRA collected the fees billed for her work. "Collect" means both "to gather" and "to receive payment." *Black's Law Dictionary* 180 (Abridged 6th ed. 1991). Thus, the Agreement is

susceptible to either interpretation, i.e., that WRA had a duty to actively procure clients' fees, or that it was merely to receive payment of such fees. Either way, however, Estell's obligation to reimburse WRA was not made contingent upon WRA's collection of fees. The trial court, therefore, correctly concluded WRA's duty to collect fees "was not a condition precedent to [Estell]'s duty to repay any overpayment." *Appellant's Appendix* at 11.

Estell further contends, "quite aside from [WRA's duty to collect], it is an 'implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him . . . .'" *Appellant's Brief* at 18 (quoting *United States v. Beutas*, 324 U.S. 768, 769 (1945)). In this regard, Estell seems to assert WRA pursued collection of outstanding client fees in bad faith, thus adversely impacting her obligation to repay. Although "Indiana law has adopted a doctrine which . . . imposes 'an implied obligation to make a reasonable and good faith effort to satisfy [a] condition[,]"*AquaSource, Inc. v. Wind Dance Farm, Inc.*, 833 N.E.2d at 537 (quoting *Hamlin v. Steward*, 622 N.E.2d 535, 540 (Ind. Ct. App. 1993)), WRA's collection of clients' fees was not a condition precedent to Estell's obligation to repay. *See supra.* Further, "Indiana law does not require that a general duty of good faith and reasonableness be implied in every contract." *Pardieck v. Pardieck*, 676 N.E.2d 359, 364 (Ind. Ct. App. 1997), *trans. denied*. The absence of such an implied obligation notwithstanding, the evidence demonstrates WRA did attempt to collect outstanding clients' fees, the successful collection of which the trial court credited to Estell. Finally,

the Agreement clearly incentivized WRA's collection efforts because any dollar recovered from Estell represented three dollars not recovered from clients.

4.

Estell contends the trial court failed to credit her for post-termination collections, citing the trial court's order that states, "[u]pon cessation of employment any overpayment . . . [was] to be repaid within 90 days of termination of employment. There would be no future collections from which that payment could be made." *Appellant's Appendix* at 10. That portion of the order, however, merely explained the mechanics of the repayment of base compensation. Elsewhere in the order, the trial court clearly credited Estell with post-termination collections, stating "[t]he Court finds that [Estell] should be given credit against the overpayment she owes in the amount of $4,076, that being one-third of the $12,228 collected since May 31, 2000." *Id.* at 12.

5.

Finally, WRA cross-appeals, contending the trial court erred by not awarding interest on the amount of outstanding funds not yet repaid by Estell. Estell counters that WRA has waived this claim because: (1) WRA's complaint did not include a claim for pre-judgment interest; and (2) WRA mentioned pre-judgment interest in its proposed findings of fact and conclusions of law only in connection with its claim for an account stated. Estell is correct.

In its proposed finding of fact and conclusion of law, WRA proposed, "[t]he [judgment amount] was *an Account stated*, fixed by the 1999 accounting on March 4, 2000. . . . The additional amount of $3,888.38 was a sum certain as of June 30, 2000.

The Court further finds and rules as a matter of law that such sums should bear interest from and after those respective dates, *as provided by statute*." *Id.* at 45 (emphasis supplied). WRA's request for pre-judgment interest related solely to its "account stated" claim. *See* Ind. Code Ann. § 24-4.6-1-103 (West, PREMISE through 2006 Public Laws approved and effective through March 15, 2006.). At no time during trial did WRA request pre-judgment interest in relation to its breach of contract claim. WRA may have been "entitled . . . to prejudgment interest as a component of the proper damages for its breach of contract claim[,]" but it did not request pre-judgment interest in connection therewith. *Appellee's Cross-Reply Brief* at 4. WRA's claim, therefore, is waived. *See Wenzel v. Hopper & Galliher, P.C.*, 779 N.E.2d 30 (Ind. Ct. App. 2002) (a party may not ask this court to grant relief he failed to request from the trial court), *trans. denied*.

Judgment affirmed.

MAY, J., and CRONE, J., concur.